FILE DATE
Oct 13 2006

No. 05-1424

In The

Supreme Court of the United States

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

PEGGY HAWKINS-DEAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review where the claimed circuit split between the Ninth and other circuits – concerning the judicial standard of review where an ERISA plan claim fiduciary acts under a conflict of interest – has been recently harmonized with other circuits' standards by the *en banc* Ninth Circuit and, in any event, resolution of the standard of review issue would not affect the outcome in this case.

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INTRODUCTION

Petitioner asks this Court to review an unpublished decision that is based on the Ninth Circuit's 1996 decision in *Atwood v. Newmont Gold*, 45 F.3d 1317 (9th Cir. 1996) ("*Atwood*"), *overruled by Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 966 (9th Cir. 2006) (en banc) ("*Abatie*"). Pet. for Cert., App. 1-3.[1] However, the en banc Ninth Circuit has recently overruled *Atwood*, thus rendering the reasoning of the decision below obsolete. *See Abatie*, 458 F.3d at 966. Any remaining variations among the circuits of the issue presented – the judicial standard of review where an ERISA plan claim fiduciary acts under a conflict of interest – do not amount to a genuine conflict among the circuits, much less an important one. On the contrary, the differences in the circuits' standard of review formulae are more semantic than real.

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[1] This Court has been faced previously with petitions for certiorari in cases involving the same issues presented here, one as recently as this year and two as recently as 2005, and has declined to grant the petitions in those cases. *See, e.g., Colucci v. AGFA Corp. Severance Pay Plan*, 431 F.3d 170 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 2300 (2006); *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005); *Kobs v. United Wis. Ins. Co.*, 400 F.3d 1036 (7th Cir.), *cert. denied*, 126 S.Ct. 749 (2005); *Delta Family-Care Disability & Survivorship Plan v. Marshall*, 258 F.3d 834, 841 (8th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1021, 1024 (7th Cir.), *cert. denied*, 525 U.S. 947 (1998); *Brown v. Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

STATEMENT

After Respondent Peggy Hawkins-Dean became permanently disabled, she applied for benefits through the ERISA-governed company disability plan insured by Petitioner MetLife. Petitioner denied her claim for benefits, and Ms. Hawkins-Dean filed suit in the District Court. During the course of litigation, Petitioner reversed its position and conceded Ms. Hawkins-Dean's disability. The court remanded to Petitioner to calculate the amount of benefits, which according to the terms of the plan would be 60% of her monthly earnings.

Stock bonuses annually comprised a substantial portion of Ms. Hawkins-Dean's earnings, often exceeding her salary. Her W-2s reflect that she received stock and stock option income every year from 1995 through 1999. In 1995, Ms. Hawkins-Dean earned approximately $75,000 in salary and $48,000 in stock; in 1996, she earned a salary of $38,000 and $68,000 in stock; in 1997, $35,000 in salary and $85,000 in stock; in 1998, $24,000 in salary and $123,000 in stock; in 1999, $3,200 in salary and $60,000 in stock. R 129-133, SR 123-134.

Contrary to the terms of the Summary Plan Description ("SPD"), Petitioner determined that Ms. Hawkins-Dean's $123,000 in stock bonuses reported on her 1998 W-2 should not be considered in the calculation of her average monthly earnings. The SPD provides that a disabled employee is entitled to a monthly benefit equal to 60% of the monthly average of "earnings, **including . . . bonuses**, for the prior calendar year as reported by the Employer on Wage Form W-2. . . ." SR 9 (emphasis added). Rather than following the SPD and including bonuses, MetLife used a figure that it obtained from Ms. Hawkins-Dean's employer's

response to a MetLife questionnaire that asked for the amount of the employee's "Basic Earnings (exclusive of overtime, bonus, etc.)." SR 73. Ms. Hawkins-Dean repeatedly pointed out to MetLife that the number requested in its questionnaire was irrelevant because it specifically excluded "bonuses," a form of compensation specifically included in the SPD formula. MetLife repeatedly ignored Ms. Hawkins-Dean and the clear language of the SPD. R 121-22. Based on the much lower figure obtained from the questionnaire, Petitioner decided that Ms. Hawkins-Dean's monthly benefit, after taking a credit for her Social Security disability award, was only $152.50. SR 137.

Petitioner justifies its decision to ignore the value of the stock/stock options that appear on the 1998 W-2 by claiming that Ms. Hawkins-Dean "cash[ed] in company stock" in 1998 and shortly thereafter went out on disability. Pet. for Cert., 13-14. MetLife wrongly asserts that Ms. Hawkins-Dean's W-2 earnings for 1998 reflect a one-time "inflated" value and that to use the full earnings reflected on the 1998 W-2 would result in "windfall." Pet. For Cert. 5-6, 14. There is absolutely nothing in the administrative record prepared by MetLife supporting such an allegation. Indeed, the evidence establishes that Ms. Hawkins-Dean was not working for salary alone – her work earnings, every year, included company stock awards. Stock and stock options were a substantial part of her yearly earnings.

Ms. Hawkins-Dean again sought review in the District Court, which found that Petitioner had not abused its discretion in excluding the stock receipts from her benefits calculation. The Ninth Circuit reversed, finding that the calculation should have included the stock receipts.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Has Overruled *Atwood*, Which Was the Decision on Which the Court Below Relied.

The petition for a writ of certiorari asks this Court to review a case, *Atwood*, that has now been overruled en banc by the Ninth Circuit in *Abatie*. "A conflict with a decision that has been discredited or that has lost all weight as authority because of intervening decisions of . . . the same court, will not be an adequate basis for granting certiorari." R. Stern & E. Gressman, SUPREME COURT PRACTICE 230 (8th ed. 2002).

Under *Atwood*, courts required that a participant come forward with "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show" that the administrator's decision was tainted by its conflict of interest. 45 F.3d at 1323. If the participant met this burden, and the administrator was unable to rebut this evidence, then the standard of review was de novo rather than for abuse of discretion. *Id.* at 1316, 1323.

In Petitioner's recital of the opinion below, Petitioner acknowledges that the decision "followed and applied the standard of review mandated by the Ninth Circuit's decision in *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995)." Petitioner also argues that "the Ninth Circuit's approach is contrary to . . . this Court's decision in *Firestone*." Pet. for Cert., 9, citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) ("*Firestone*"). The *Abatie* court specifically overruled *Atwood*, determining that *Atwood* contradicted this Court's mandate in *Firestone*, 489 U.S. at 113. *Abatie*, 458 F.3d at 966-67. Petitioner's argument in favor of granting the petition is therefore

inapposite. *See Abatie*, 458 F.3d at 959 ("We conclude that our earlier opinion in *Atwood v. Newmont Gold Co.*, 45 F.3d 1317 (9th Cir.1995), misinterpreted *Firestone*.").

Firestone requires that a conflict of interest *must* be weighed in reviewing the discretionary decision of a conflicted fiduciary. 489 U.S. at 115. More recently, this Court confirmed the importance of judicial scrutiny where there is a conflict of interest, noting that "[i]n *Firestone Tire* itself we noted that review for abuse of discretion would home in on any conflict . . . if a conflict was plausibly raised." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n.15 (2002). This Court has also acknowledged that where the fiduciary has a financial interest in the claims decision, the "fiduciary capacity [is] necessarily compromised." *Pegram v. Herdrich*, 530 U.S. 211, 227 (2000).[2] The *Abatie* court held that *Atwood* did not follow the *Firestone* mandate. *Abatie*, 458 F.3d at 966-67. The *Abatie* court noted that the *Atwood* standard did not require courts to weigh conflicts of interest unless the participant could show the conflict tainted the decision-making process, in violation of *Firestone*. *Id.* The *Abatie* court also determined that *Atwood* violated *Firestone* because *Firestone* did not allow a de novo standard of review where discretionary language was present, which

[2] The RESTATEMENT (SECOND) OF TRUSTS also recognizes that a trustee can exercise discretionary power only if the trustee has complied with the duty of loyalty. *See* RESTATEMENT (SECOND) OF TRUSTS § 187(a) (trustee's "exercise of power is discretionary *except* to the extent to which its exercise is required . . . by the principles of law applicable to the duties of trustees," including § 170 (duty of loyalty)) (emphasis added). The duty of loyalty requires trustees to avoid conflicts of interest.

Atwood had permitted. *Id.* Therefore, Petitioner's question has been addressed by the Ninth Circuit.[3]

Because the *Abatie* court has redefined the Ninth Circuit's conflict of interest analysis to ensure that it adheres to the mandates of the *Firestone* decision, Petitioner's concerns have been addressed, and there is no need for Supreme Court review.

B. The Circuits State the *Firestone* Rule in Slightly Different Ways, But That Does Not Amount to A Conflict, Much Less An Important One.

There is no conflict among the circuits in weighing a claims administrator's conflicts of interest. Petitioner exaggerates the differences between the circuits and the significance of those differences. In applying *Firestone*, the circuits have all adopted some variation of a "sliding scale" approach when evaluating a decision made by a conflicted fiduciary, whereby the court "approximately calibrat[es] the intensity of our review to the intensity of the conflict." *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 393 (3d Cir. 2000); *see Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233-34 (4th Cir. 1997); *Vega v. National Life Ins. Servs.*, 188 F.3d 287, 297 (5th Cir. 1999) (en banc); *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1069 (6th Cir. 1998); *Chojnacki v. Georgia-Pacific Corp.*, 108

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[3] Petitioner also asks whether the Ninth Circuit erred in holding that the "administrator, not the participant, bears the burden of proof as to whether a conflict of interest tainted the administrator's benefits decision." Pet. for Cert., i. In fact, the Ninth Circuit did not so hold in this case. *See* Pet. for Cert., App. 2-3. Nonetheless, the *Abatie* court rejected *Atwood*'s burden-shifting regime. 458 F.3d at 973. Thus, the analysis of the decision below has been rendered obsolete by *Abatie*.

F.3d 810, 815 (7th Cir. 1997); *Clapp v. Citibank N.A. Disability Plan*, 262 F.3d 820, 827 (8th Cir. 2001); *Fought*, 379 F.3d at 1004-05, *cert. denied*, 544 U.S. 1026 (2005).[4]

Although the Ninth, Sixth, and First Circuits eschew the phrase "sliding scale," their approach to conflicts of interest is essentially the same, despite the different metaphors. In fact, the Ninth Circuit acknowledged that the approach it adopted in *Abatie* "is substantially similar to that adopted by several other circuits," despite rejecting the "sliding scale" metaphor. 458 F.3d at 967. In *Abatie*, the Ninth Circuit held that although abuse of discretion review applies "whenever an ERISA plan grants discretion to the plan administrator," that review must be tempered with "skepticism," with the conflict of interest being weighed more or less heavily depending on the conflict's "nature, extent, and effect on the decision-making process. . . ." 458 F.3d 955, 967-68. Although the Sixth Circuit also does not label its approach as a sliding scale, the result is the same, where the abuse of discretion standard of review may be "shaped" by evidence of a conflict of interest. *Borda*, 138 F.3d at 1069. The First Circuit requires that courts conduct an arbitrary and capricious review with "more bite," which is no different than a sliding scale. *See Janeiro v. Urological Surgery Professional Ass'n*, 457 F.3d 130, 142 (1st Cir 2006) (applying the level of "bite" necessary to account for the severity of the

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[4] Petitioner mis-characterizes the Fourth Circuit's standard for evaluating conflicts of interest as a "Restatement of Trusts § 187 Standard" rather than a sliding scale standard. *Compare* Pet. for Cert., 10-11 *with Ellis*, 126 F.3d at 233 ("It therefore appears that in no case does the court deviate from the abuse of discretion standard. Instead, the court modifies that abuse of discretion standard according to a sliding scale.").

conflict may require "no deference to the conflicted decisionmaker"); *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999) (holding that "fine gradations in phrasing are as likely to complicate as to refine the standard").

Only the Second and Eleventh Circuits employ a slightly different standard from the sliding scale model. In the Second Circuit, the plan participant must produce evidence that proves that the conflict of interest tainted the administrator's decision to receive anything but abuse of discretion review. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996) (holding that plaintiffs have the burden of proving that the conflict of interest affected the administrator's decision). The Eleventh Circuit has determined that an administrator's financial conflict is an inherent and substantial conflict of interest and engages in a burden-shifting approach to enable the parties to demonstrate the extent of the conflict. *Brown*, 898 F.2d at 1561-62, *cert. denied*, 498 U.S. 1040, 1566-67 (1991). The Eleventh Circuit labels this approach as a "heightened arbitrary and capricious standard." *Torres v. Pittston Co.*, 346 F.3d 1324, 1334 (11th Cir. 2003); *see also HCA Health Services of Georgia, Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001) ("The arbitrary and capricious deference is diminished, though, if the claims administrator was acting under a conflict of interest."); *Buckley v. Metro. Life*, 115 F.3d 936, 939 (11th Cir. 1997) (outlining that the Eleventh Circuit applies "heightened arbitrary and capricious where there is a conflict of interest"). Thus, this approach is not in substantial conflict with the other circuits.

C. Regardless of the Standard of Review, the Court Below Reached the Correct Result.

Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . ." This Court has also stated that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The specific amount of Ms. Hawkins-Dean's benefit is a finding of fact based on the underlying plan document and Ms. Hawkins-Dean's W-2 form. Reviewing this factual determination is not a "compelling reason" for the Court to grant Petitioner's request for a writ of certiorari. Petitioner nonetheless asks this Court to review a factual determination that Ms. Hawkins-Dean was entitled to benefits based on the earnings reported on her W-2 form. No matter what standard of review the court below would have applied, it made the correct factual determination.

Although the Ninth Circuit held that MetLife's denial of benefits should have been reviewed de novo, Ms. Hawkins-Dean would have prevailed even if the standard of review was for abuse of discretion. The only reasonable application of the plan's formula for determining benefits is the calculation that Ms. Hawkins-Dean sought and the Ninth Circuit ordered. MetLife's determination lacked factual foundation, as it was based on an irrelevant question in the company's questionnaire.

The SPD states that a disabled person covered by the plan is to receive a monthly benefit equal to "60% of Basic Monthly Earnings minus Other Income Benefits." R 80. "Basic Monthly Earnings" is defined as "the greater of (1) your **earnings**, **including** overtime **and bonuses**, for the

prior calendar year **as reported by the Employer on Wage Form W-2** averaged over the number of months of such W-2 earnings; and (2) your base monthly salary." R 90 (emphasis added). Ms. Hawkins-Dean became disabled in 1999. The prior calendar year, 1998, she earned, "**as reported by the Employer on Wage Form W-2,**" $151,854.97. R 123 (emphasis added). The monthly benefit due Ms. Hawkins-Dean under the plan is $7,592.75, less any applicable offsets ($151,853.97 X 60% / 12 = $7,592.75).

MetLife ignored the plan's formula for calculating benefits, and instead used Ms. Hawkins-Dean's base earnings to determine that it was only liable to pay Ms. Hawkins-Dean $152.50 per month. Ms. Hawkins-Dean's base salary represented only part of her "earnings" as defined in the SPD. "It is an abuse of discretion for an ERISA plan administrator to make a decision without any explanation, or in a way that conflicts with the plain language of the plan, or that is based on clearly erroneous findings of fact." *Atwood*, 45 F.3d at 1323-24, *overruled on other grounds by Abatie*, 458 F.3d at 966.

MetLife contended that most of Ms. Hawkins-Dean's earnings reported by her employer on the W-2 for 1998 were stock options and "stock options are not referred to as among the types of compensation to be included in the calculation of Basic Monthly Earnings. Additionally, as per the terms of the SPD, the definition of Basic Monthly Earnings clearly does not include stock options so logically stock options are not included in the calculation." R 126. While stock and stock options are not specifically mentioned as part of "Basic Monthly Earnings," they are also not excluded from the definition. There is no logical basis for excluding stock and stock options from "Basic Monthly Earnings" since they are reflected in the W-2 and since the

SPD specifically includes "bonuses" within the definition of "Basic Monthly Earnings."

There is nothing in the four corners of the plan that says that a stock option is not a bonus. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th Ed. 1997) defines "bonus" as: "something in addition to what is expected or strictly due . . . money or an equivalent given in addition to an employee's usual compensation . . . a premium (as of stock) given by a corporation to a purchaser of its securities, to a promoter, or to an employee. . . ." *Id.* at 131. Moreover, the claims record shows that the award of stock and stock options to Ms. Hawkins-Dean in fact carried the label "bonus." Awards of restricted stock in 1997, 1996, and 1995 were each labeled as a "bonus holdback." SR 124, 126, 130. Therefore, the stock options, which were reported as income on Ms. Hawkins-Dean's W-2, are properly categorized as bonuses that are specifically included in calculating plan benefits.

Ms. Hawkins-Dean was not working for a salary alone. She was also working for the company stock.[5] The stock and stock options were the major source of her work earnings; the value of the stock and stock options exceeded her regular salary in 1996, 1997, 1998, and 1999. R 129-33. Ms. Hawkins-Dean's earning large sums in stock grants from her employer was not, as suggested by Amicus, a one-time deal. It was a yearly event and a substantial part of her earnings from her employer. If

[5] There can be no doubt that stock and stock options granted by an employer to its employees are a form of compensation for work. *Scully v. U.S. WATS, Inc.*, 238 F.3d 497, 508 (3d Cir. 2001); *Greene v. Safeway*, 210 F.3d 1237, 1243 (10th Cir. 2000); *In re Burlington Coat Factory Sec. Lit.*, 114 F.3d 1410, 1424 (3d Cir. 1997).

indeed the purpose of the plan is to protect the income of the plan beneficiaries should they become disabled, Ms. Hawkins-Dean had every reason to believe that the plan's protection extended to all of her work earnings, including the stock and stock options granted to her every year by her employer and reported on her W-2s.

Thus, regardless of the standard of review, "Basic Monthly Earnings" includes bonuses, and bonuses include stock options, so Ms. Hawkins-Dean was entitled to prevail. Therefore, the standard of review was not outcome-determinative in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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